



## **THE THREE RELICENSING PROCESSES KLEINSCHMIDT'S EXPERIENCE AND RECOMMENDATIONS TO LICENSEES**

**BY LAURA COWAN**

### **INTRODUCTION**

Hydroelectric project owners and Licensees have three Federal Energy Regulatory Commission (FERC or Commission) process options to choose from when embarking on a project licensing or relicensing: the Integrated Licensing Process (ILP), the Traditional Licensing Process (TLP), and the Alternative Licensing Process (ALP). While each of the three processes has advantages and disadvantages, one process may be more effective than others depending on project-specific considerations. Kleinschmidt has extensive experience with each of the three licensing processes and, particularly since the ILP's inception in 2005, has observed how implementation of a particular process can affect the tone, pace, and outcome of a relicensing for a particular project. This document summarizes the three process types and presents some of Kleinschmidt's recent experience with these three processes as a guide to assist Licensees in understanding recent trends in relicensing and the options available to their project.

The FERC default process is known as the Integrated Licensing Process (ILP); however, the Traditional Licensing Process (TLP) and the Alternative Licensing Process (ALP) are two other options sometimes preferred by Licensees, and in some cases, resource agencies participating in the process. The ILP is "front-loaded" in that it involves consultation with agencies and stakeholders early in the process and has deadlines for Licensees and stakeholders to prepare and review primary licensing documents. The TLP and ALP processes provide more flexibility for the Licensee and stakeholders in the initial stages of relicensing but have multiple opportunities for agencies and stakeholders to request additional studies and have no precise deadlines for completion of activities or reviews.

Regardless of the process the Licensee undertakes, the ultimate responsibility for environmental review of the project pursuant to the National Environmental Policy Act (NEPA) rests with FERC. Once the Licensee files the Final License Application under the ILP or TLP, or files an Applicant-Prepared Environmental Assessment in the case of the ALP, FERC begins its independent evaluation. FERC issues its own NEPA document, which is either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS), conducts public scoping (if not already completed), provides for comments on the NEPA document, and analyzes environmental and economic impacts, including cumulative effects<sup>1</sup>, of the project.

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<sup>1</sup> Section 1508.7 of the National Environmental Policy Act, as amended, defines cumulative effects as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

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## **INTEGRATED LICENSING PROCESS**

The ILP is the default licensing process and is designed to provide a structured schedule and transparent documentation that enables a timely completion of the licensing process. Although not stated explicitly, one goal of developing the ILP process was to prevent relicensings from extending years beyond the current license's expiration, often at a significant expense to Licensees and stakeholders. The ILP is a front-loaded process that identifies environmental issues and associated study planning early through NEPA scoping. The process sets a rigidly defined schedule (for not only the Licensee, but also for stakeholders and FERC) that can only be altered by petitioning FERC. Because the ILP sets a secure timeframe for commenting and decision-making, it is particularly valuable in cases with conflicting stakeholder values or with the potential for controversial issues. It is also useful for larger projects where the issues are few but stakeholder involvement is important from the beginning of the process. In short, the ILP lays out deadlines for various steps that include stakeholder involvement and formal FERC decision making, with the timeline starting when the Notification of Intent (NOI) and Pre-Application Document (PAD) are filed.

### **GENERAL CONSULTATION AND LICENSE APPLICATION PREPARATION**

The first formal action in any of the three processes is to concurrently file the NOI and the PAD. The NOI is a standard document notifying FERC and the public that the Applicant or Licensee intends to license or relicense a project, while a PAD is a document summarizing the reasonably available information regarding the project, operations, and environmental resources. The PAD also typically includes a description of studies that the Licensee anticipates conducting as part of the relicensing. Under the ILP, the date that the NOI and PAD are filed serves as the basis for future deadlines.

Within 60 days of the Licensee filing an NOI and PAD, FERC will issue a notice of commencement of proceeding, including a Scoping Document which identifies the FERC staff's preliminary list of issues to be addressed in its eventual NEPA analysis. Following the Scoping Document, FERC holds a public scoping meeting and site visit and conducts tribal consultation, if applicable. Although FERC is the lead for coordinating the public meeting, Kleinschmidt has found it helpful to assist FERC in organizing and informing stakeholders of the meeting. Following the meeting, stakeholders have an opportunity to comment on the PAD and Scoping Document, as well as request studies and information regarding the Project. Under the ILP, stakeholders' requests for information or studies must meet certain criteria (defined by 18 CFR 5.9(b)), essentially proving that the requested information or study would be necessary for a complete NEPA analysis; in particular, such information or study requests must have a direct nexus to the project operations. The public again is invited to comment on draft and revised study plans, after which FERC issues its Study Plan Determination. In its determination, the FERC Director considers the revised study plans and any outstanding agency comments or study requests and then generally approves the plans, approves the plans with modification, or requests additional studies. In rare cases, a Licensee may propose on its own a study that FERC deems unnecessary or inappropriate. In this case, Kleinschmidt's experience shows that FERC will not

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approve that particular study, essentially meaning that the Licensee may conduct the study on its own, but FERC will not require it.

FERC has responded to stakeholder requests for studies in multiple ways, but generally requires studies that will likely help the NEPA process, rather than studies that may not add significant value or do not have a direct nexus to project operations. Kleinschmidt's experience with FERC has been such that it can be lenient on a stakeholder if their filed study request does not clearly respond to each of FERC's requirements for a study as long as the stakeholder can at a minimum show that the study is relevant to the Project and would provide valuable information for FERC's NEPA documents. However, our experience also suggests that FERC is also deliberate in only approving studies that have a clear nexus to the Project.

An example of the first instance, where FERC issued a study plan determination incorporating comments from stakeholders despite not meeting all of the specific requirements for a study request, can be found in the Claytor relicensing proceeding (P-739). A stakeholder requested, following review of the draft study plan, that additional mussel surveys be added to the second year of studies. In response, the Licensee modified their study plan to incorporate the additional sampling. FERC approved the addition, despite the fact that the original request did not meet all requirements for requesting a study<sup>2</sup>.

On the other hand, during the London/Marmet and Winfield relicensing, the West Virginia DNR requested that the geographical scope of a recreation study be expanded to include reservoirs upstream of the projects. In this case, FERC concluded in its study plan determination that because the reservoirs "do not provide any project-related public access or recreation..." that "the scope of the study should not be expanded to include the upstream reservoirs, as requested by West Virginia DNR."<sup>3</sup> FERC did not require the Licensee to expand the geographical scope of the project.

With the possible exception of study requests made by agencies with mandatory conditioning authority, the ILP can offer the Licensee some level of protection against having to complete arbitrary, prohibitively costly, or excessively long-term studies. The Study Plan Determination and the Formal Dispute Resolution process, which can be used in the case of a disagreement by either the Licensee or stakeholder with the Study Plan Determination, can help Licensees confront any requests for information and studies early in the process and not have to face them late in the relicensing where the requests could cost the Licensee even more money in time and legal expenses.

Once the first year of studies are conducted, stakeholders can again comment on the reports in writing or in a meeting, as well as request additional information or studies for a second year;

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<sup>2</sup> FERC. 2008. Modifications to existing studies for the Claytor Project. P-739-018 – Virginia Claytor Project, Appalachian Power Company. September 10, 2008.

<sup>3</sup> FERC. 2009. Study Plan Determination for the London/Marmet and Winfield Hydroelectric Projects. Project Nos. 1175-013 and 1290-011 – West Virginia, London/Marmet Hydroelectric Project and Winfield Hydroelectric Project, Appalachian Power Company. June 25, 2009.

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likewise, they can then comment on the reports following the second year of studies. For study requests for the second year of studies, however, FERC holds stakeholder requests to a higher level of scrutiny by requiring that the stakeholder demonstrate why the study request was not made for the first year of studies.

The Licensee, roughly 2.5 years before license expiration, files either a Preliminary Licensing Proposal, or a Draft License Application, which will serve as the basis for the Final License Application. The PLP describes existing and proposed project facilities, existing and proposed operations, measures for protection, mitigation, and enhancement (PM&Es) for each resource affected by the action, and a draft environmental analysis for each resource area. The PLP will ultimately effectively serve as the Exhibit E of the Final License Application. Alternatively, the Licensee can develop a draft License Application including an Exhibit E with the same requirements of the PLP. Stakeholders will again have an opportunity to review this document, whether it is a PLP or a draft License Application, and provide comments prior to the Licensee filing a final License Application no later than 2 years before the license expires

Because of the multiple opportunities for stakeholder involvement, and the transparency of the process, stakeholders ideally will have made all of their concerns known prior to the Licensee filing the Final License Application. If at that point a stakeholder raises a novel issue, FERC requires that the stakeholder provide a valid reason as to why the issue was not raised earlier in the process. Ultimately the value of this process is that the issues should be understood by the time of filing the License Application, and therefore the number of potentially time-consuming and cumbersome Additional Information Requests (AIRs) issued by FERC following the License Application should be limited.

### **GENERAL KLEINSCHMIDT EXPERIENCE WITH THE ILP**

Kleinschmidt has assisted many clients with a variety of project types through their relicensings using the ILP. In fact, Kleinschmidt was involved in three of the early relicensings to use the ILP: the Smith Mountain Project on the Roanoke River, Virginia; the Canaan Project on the Connecticut River, Vermont; and the Lake Creek Project in Lincoln County, Montana.

Kleinschmidt provided ILP relicensing assistance on small facilities such as the 2.25 MW King Mill Project in Augusta, Georgia, and large facilities like the Smith Mountain Project on the Roanoke River consisting of a 50 MW conventional facility and a 586 MW pumped-storage facility. Other recent projects using the ILP where Kleinschmidt has provided relicensing services include Merced Falls in California, Otter Creek in Vermont, Lake Creek in Montana, Yards Creek Pumped Storage in New Jersey, Claytor in Virginia, London/Marmet and Winfield in West Virginia, Millville in West Virginia, and Kinzua Pumped Storage in Pennsylvania.

Kleinschmidt has found that the ILP was or is an effective method to relicense these projects. In the case of the Yards Creek relicensing, very few stakeholders initially showed interest in the Project. However, using FERC guidelines, Kleinschmidt assisted the Licensee in ensuring that all potential stakeholders received the latest information regarding the relicensing and

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encouraged them to participate at each step of the ILP process. Despite comparatively low interest in the project, the Licensee was comfortable in the fact that all environmental, recreation, and cultural issues were known and appropriately addressed at the time of the Final License Application. Near the opposite extreme, the ongoing Kinzua relicensing on the Allegheny River in Pennsylvania has attracted significant interest by the public, agencies, tribes, and NGOs. In this case, particularly because it involves a competing application, the ILP is in the interest of both applicants because of FERC's early involvement.

In any contentious relicensing the participants may not always agree on the necessary scope of studies. In the case of the Kinzua relicensing, the competing applicant requested that the Licensee conduct studies in an area that may not be affected by Project operations, and if it is affected, it was not clear at the time where or what those effects might be. The Licensee argued that until a study was done to determine if any effects from Project operations were occurring in an area outside of the Project boundary (*i.e.*, determine whether there was any nexus to the Project operations), that studies outside of the Project boundary should not be required. In FERC's study plan determination, FERC staff concurred by approving a study plan to initially evaluate whether or not the area was significantly and measurably affected by the Project, with the caveat that if Year 1 studies demonstrated significant and measurable effects in that area, then additional studies in that area may be required in Year 2. In this case, by having FERC available early in the process as the final decision-making authority on the scope and nature of studies the burden of potentially unnecessary studies was reduced.

Some Licensees have perceived the schedule outlined in the ILP as intimidating because they view the schedule as being rigid and potentially imposing unrealistic deadlines on the Licensee as well as stakeholders. Kleinschmidt's experience, however, has been that while ideally relicensings follow the ILP deadlines exactly, FERC may relax some of the interim deadlines if an extension is in the best interest of the major parties so long as it would not adversely affect certain future critical timelines. For example, during the Kinzua Relicensing, the original ILP schedule set a deadline for the Year 1 study reports in early October. Several environmental studies included field work that would extend beyond the deadline for the report. Because of this and other intervening issues, the Licensee requested that the deadline for all of the study reports be extended so that they could avoid providing partial reports or holding multiple meetings to review the studies; FERC granted this request. The FERC record identifies a number of other cases<sup>4</sup> where aspects of the ILP schedule have been modified to accommodate critical needs of stakeholders or the Licensee.

Overall, Kleinschmidt's experience is that the ILP is an effective process for most relicensings. In projects with limited issues, the ILP can provide some level of comfort that an overzealous stakeholder will be limited in their ability to hold up the relicensing process. On the other hand,

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<sup>4</sup> FERC approved an extension for filing the Initial Study Report for the Conowingo and Muddy Run relicensings in a letter dated January 21, 2011, stating that the extension would "avoid a piecemeal review process." FERC also approved an extension for similar reasons for the Yuba River Development Project (P- 2246) on June 22, 2012; the Hogansburg Hydroelectric Project (P-7518) on August 16, 2012; and the Merced River Hydroelectric Project (P-2179) on August 19, 2010.

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in relicensings that are contentious, FERC's early involvement, the pre-determined schedule and FERC's role in the Study Plan Determination enable the relicensing to stay on track despite disagreements between the Licensee and stakeholders or among the stakeholders themselves. In general, Kleinschmidt has found that the ILP is the likely process of choice for any relicensing where the Licensee does not anticipate developing a settlement agreement; in these cases, the Licensee may want to consider using the TLP or ALP.

### **TRADITIONAL LICENSING PROCESS**

The ILP's predecessor, the TLP, offers Licensees a flexible process with little to no up-front involvement from FERC. FERC conducts its scoping after the License Application is filed, so the Licensee is initially responsible for ensuring that adequate studies were conducted and the information necessary for FERC's NEPA analysis is available prior to filing the Final License Application. Essentially, the TLP offers Licensees a more flexible schedule early in the process but adds the risk of significant costs late in the relicensing, potential delays, and unpredictable outcomes caused by additional studies after the filing of the application.

### **CONSULTATION AND LICENSE APPLICATION PREPARATION**

Under the TLP, a Licensee follows the Traditional three-stage consultation process. In normal circumstances, the three-stage consultation process takes 5 years from the time the Licensee files the NOI and PAD to when they receive a new license, although in some cases that time can be much longer.

The first stage of consultation includes the Licensee filing an NOI and PAD, and requesting to use the TLP. Generally, Kleinschmidt recommends that Licensees consult with stakeholders prior to filing the NOI, PAD and the request to use the TLP, as an applicant needs to receive FERC approval before following the TLP. This is because FERC generally seeks stakeholder input prior to determining whether or not to issue permission for the TLP. If FERC approves use of the TLP, the Licensee conducts the Joint Agency/Public Meeting and site visit. Resource agencies and tribes can then provide comments on the PAD and can request studies.

The second consultation stage consists of the Licensee conducting the studies, developing a draft license application, and providing that draft application and study results to stakeholders. Stakeholders can comment on the draft application, and the Licensee may hold a stakeholder meeting if substantive disagreements exist.

The third and final stage consists of the Licensee filing the final License Application with FERC.

### **GENERAL KLEINSCHMIDT EXPERIENCE WITH THE TLP**

Kleinschmidt has found that some Licensees prefer the TLP as it allows them more control of the process and under certain circumstances may require less time and resources, particularly for smaller projects having fewer issues. Some larger projects, such as SCE&G's 207.3-MW Saluda

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Hydroelectric Project (FERC No. P-516) in Lexington, SC, have recently used the TLP with success<sup>5</sup>. In the case of the Saluda relicensing, the Licensee used the flexibility of an “enhanced” TLP to build relationships with the stakeholders and to ultimately develop a settlement agreement with stakeholders for filing with the License Application. The Saluda Project is located in an urban area and provides recreation opportunities within the surrounding communities, as well as for those from throughout the state. Because of the important resources, there was a high degree of stakeholder participation in the project relicensing from homeowner groups, NGOs, local businesses and other special interest groups. In Kleinschmidt’s assistance of the licensee during the Saluda relicensing, Kleinschmidt led a series of stakeholder workshops regarding project operations, recreation, minimum flows, fish and wildlife, lake and land management, cultural resources and water quality in order to work through issues with a project nexus. The TLP allowed SCE&G and the stakeholders to come to resolution on project issues and negotiate studies that may not have fit the rigid schedules within the ILP. The success of this TLP was that the licensee successfully developed the study plans in conjunction with the stakeholders, and FERC in its NEPA findings determined the studies were adequate and appropriate for the analysis.

Kleinschmidt is also assisting Alabama Power with the 46.9 MW Holt Relicensing (FERC No. P-2203) and is using the TLP. In this case, the Project boundary is small, and the Project uses a US Army Corps of Engineers Dam. In addition, the issues were well understood early in the process because the issues were very similar to, but more limited than, those in the recently relicensed Warrior River Project (FERC No. P-2165). (Kleinschmidt also assisted the licensee with the Warrior Project.) These factors led the Licensee to choose the TLP process, believing that it would be more cost-effective given the understanding of the issues and the stakeholders. The relicensing to date has been successful, and, in fact, the draft License Application has only received two comment letters. However, Kleinschmidt notes that even in this project that was thought to have only minor issues, the relicensing ended up having added complexity due to issues such as placement of recreation resources, Project boundary discrepancies, and cultural resources.

Although these two recent examples of Kleinschmidt’s use of the TLP have been largely successful, the history of the TLP contains many examples of processes that lasted years beyond the original planned schedule. The timeline for receiving a FERC license can be extended because of many reasons, but typically it stems from disagreements between the Licensee and the stakeholders. Because there is no FERC involvement early in the process, stakeholders can request information or studies after the license application is filed, which can prompt FERC to issue AIRs. These AIRs could range from a simple data request to multiple expensive and/or intensive field studies. AIRs can be issued multiple times, and therefore may continue for years beyond the license expiration. In these cases, FERC typically grants an annual extension of the existing license, and the Licensee can continue to operate under the terms of its previous license. In some cases, especially for Licensees with favorable license terms and who expect a less

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<sup>5</sup> The NOI and PAD for the Saluda Project were filed in April 2005, and therefore prior to July 23, 2005, when the ILP became the default relicensing process.

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favorable new license, the benefit of these annual extensions can outweigh the added relicensing (study and process) costs.

### **ALTERNATIVE LICENSING PROCESS**

The ALP is a process best suited for relicensings where stakeholder involvement and a settlement agreement is anticipated and that the Licensee and participants would be amenable to a process built on communication and consensus-building. In general, a Licensee should consult with stakeholders prior to filing the PAD and NOI, as an applicant needs to receive FERC approval before following the ALP, and because the ALP is so dependent on consensus-building, FERC prefers that all stakeholders support the use of the ALP. While FERC does not formally make decisions on issues and studies under the ALP as it does under the ILP, Kleinschmidt's experience is that FERC staff may be more active during the pre-filing period of the ALP than during the pre-filing period of the TLP.

### **CONSULTATION AND LICENSE APPLICATION PREPARATION**

If approved, the ALP allows Licensees and stakeholders to tailor the relicensing process by combining the consultation, study, and environmental review processes. FERC conducts its scoping activities early in the ALP process, during the pre-filing consultation process. However, the schedule, rather than being driven by FERC or the Licensee alone, is driven jointly by the Licensee and the stakeholders. In a similar spirit of consultation and consensus-building, the stakeholders and Licensee are to communicate and reach consensus on the environmental studies as well. In the ALP process, the Licensee prepares essentially a draft Environmental Assessment (an Applicant-Prepared Environmental Assessment [APEA]) in lieu of the Environmental Report or Exhibit E as part of their license application, although both documents largely contain the same information, and Kleinschmidt generally prepares all types in an Environmental Assessment format. The APEA analyzes how the proposed operation and the proposed PM&Es will affect the project's environmental and economic resources and reasonable operating alternatives. Like an EA it may also evaluate alternative project operations and PM&E measures that best balances power and non-power values. Following the Licensee's filing of the License Application including an APEA, FERC still issues either an EA or EIS consistent with NEPA regulations.

In relicensings where stakeholders agree to come together to develop settlement agreements, the ALP can offer the Licensee more flexibility in its schedule for conducting studies and working with stakeholders. However, there are risks to the Licensee should the settlement agreement dialogue fall apart. Similar to the TLP, stakeholders who feel that their concerns are not being heard can intervene late in the process and request additional and potentially cumbersome study and information requests after the license application is filed. These late requests can ultimately result in a delay in FERC issuing the new license and may impose additional substantial costs to the licensing process.

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### **GENERAL KLEINSCHMIDT EXPERIENCE WITH THE ALP**

Kleinschmidt has assisted Licensees in the past in using the ALP, but in general, believes that the ILP and TLP typically better suit the needs of the Licensee except in rare cases where the licensee has a relatively predictable relationship with agencies and stakeholders and anticipates a comprehensive settlement agreement. Kleinschmidt also encourages anyone considering using the ALP to meet with stakeholders early to discuss the process to ensure that all participating parties are comfortable with the ALP process.

### **CONCLUSIONS**

Kleinschmidt's recent experience suggests that the ILP is appropriately the default FERC relicensing process. For most relicensings, the defined ILP schedule and FERC support can reduce the risk of the expense of an extended relicensing process. This is particularly true in contentious proceedings or for those projects with multiple resource issues. The schedule can be intensive, particularly in relicensings with heavy stakeholder involvement, but the upfront effort can result in significant long-term cost savings. The TLP certainly should not be completely ruled out, as it can be efficient and cost-effective particularly in projects with limited issues, although the TLP carries a higher risk of potential costly surprises towards the back-end of the relicensing. Finally, Kleinschmidt believes that the ALP should be considered only when the Licensee and stakeholders can be dedicated to building a cooperative and consensus-building relationship. The ALP can result in a high costs to the Licensee post-licensing as often, in order for all parties to sign, the settlement has to incorporate measures to address all stakeholder issues.